



COURT MARTIAL

Citation: *R. v. Cooper*, 2018 CM 2014

Date: 20180312

Docket: 201705

Standing Court Martial

Halifax Courtroom Suite 505
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Master Seaman D.T. Cooper, Offender

Before: Commander S. Sukstorf, M.J.

Restriction on Publication: By court order made under section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, information that could disclose the identity of the person described during these proceedings as the complainant shall not be published in any document or broadcast or transmitted in any way.

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REASONS FOR SENTENCE

(Orally)

Introduction

[1] Master Seaman Cooper, today, 12 March 2018, the Court found you guilty of one offence under section 130 of the *National Defence Act (NDA)*, that is to say, sexual assault, contrary to section 271 of the *Criminal Code* and a second charge under section

95 of the *NDA* for ill-treating a person who by reason of rank or appointment was subordinate to you. The particulars of the two charges read as follows:

“FIRST CHARGE **AN OFFENCE PUNISHABLE UNDER**
Section 130 of the **SECTION 130 OF THE NATIONAL**
National Defence Act **DEFENCE ACT, THAT IS TO SAY,**
 SEXUAL ASSAULT, CONTRARY TO
 SECTION 271 OF THE CRIMINAL CODE

Particulars: In that he, on or about 10 November 2015, onboard HMCS ATHABASKAN, at or near Rota, Spain, did commit a sexual assault on B.H.J.

SECOND CHARGE **ILL-TREATED A PERSON WHO BY**
Section 95 of the **REASON OF RANK OR APPOINTMENT**
National Defence Act **WAS SUBORDINATE TO HIM**

Particulars: In that he, on or about 10 November 2015, onboard HMCS ATHABASKAN, at or near Rota, Spain, ill-treated B.H.J. by touching his genitals.”

Evidence

[2] In this case, the prosecutor provided the documents required under the *Queen’s Regulations and Orders for the Canadian Forces* (QR&O), supplied by Master Seaman Cooper’s chain of command. Further, the prosecution provided the court with an Agreed Statement of Facts, introduced on consent, to inform the court of the specific facts pertaining to Master Seaman Cooper.

[3] Further, the court benefitted from submissions by counsel to support their joint position on sentence which provided a full range of case law. In addition, the prosecution advised the court that it was not seeking an order pursuant to the court’s mandatory consideration of whether a weapons prohibition under section 147.1(1) of the *NDA* should be ordered.

[4] Counsel’s submissions and the evidence before the court have enabled me to be sufficiently informed of Master Seaman Cooper’s personal circumstances so I may consider any indirect consequence of the sentence and ensure I impose a sentence adapted specifically to Master Seaman Cooper and the offences committed.

[5] The evidence before this Court includes an Agreed Statement of Facts which reads as follows:

Agreed Statement of Facts

1. The Commanding officer of HMCS ATHABASKAN at the time of the incident indicated the following:
 - a. This incident led to the repatriation of both MS Cooper and B.H.J. to Canada. The repatriation forced a requirement to fly in replacements to theater;
 - b. From a moral perspective, many of the crew members were in disbelief that such an incident could happen onboard. This resulted in a temporary loss of mission focus; and
 - c. Some individuals from 13 mess had safety concerns as, initially, they did not know who committed the alleged act and if that person was still onboard. That concern was short lived and dissipated as soon as the Commanding Officer addressed the ship members.
2. CPO2 Martin Caya supervised MS Cooper starting on 15 Aug 2016. He states that, while MS Cooper was under his supervision at the Naval Fleet School Scheduling Office, he showed great versatility and quickly adapted to ever-changing situations. His in-depth knowledge of computer software and the assistance he provided to the Scheduling Office's staff made him a great asset to the section. MS Cooper also provided suggestions to improve the quality of the product given to the instructional staff. Overall, MS Cooper was a great addition and a vital element to the success of the Scheduling Office.
3. CPO2 Caya further states MS Cooper understands the Chain of Command and divisional system principles. He keeps his supervisors informed of appointments and of other commitments. As a subordinate, MS Cooper properly follows directions. He shows great enthusiasm when reporting for duty and shows great dedication every day. CPO2 Caya further states that from his perspective MS Cooper is a genuine person and a great worker.
4. PO1 Noble started to supervise MS Cooper in March 2017. She describes MS Cooper as a hard-working individual, who takes pride and excels at his job, who is always polite and who is well spoken. She states that MS Cooper is always eager to accomplish his assigned tasks and is always extremely helpful, often showing initiative and anticipating issues before they arise. In her opinion, MS Cooper never hesitates to help, regardless of his workload, never complains and has a positive attitude towards work.

5. B.H.J. states that the impacts of this offence on him were as follows:

- a. Right after the incident, for about a month:
 - (1) He was in shock and could not believe that the incident occurred;
 - (2) He had suicidal thoughts; and
 - (3) He was worried that he might be falsely accusing MS Cooper because he had only identified MS Cooper by voice. This caused him stress until the DNA results were obtained.
- b. To this day:
 - (1) He does not trust people like he used to. He worries that this could happen to him again; and
 - (2) He feels anger towards MS Cooper for having done this to him.
- c. In terms of career:
 - (1) For the first year following the incident, B.H.J. was attached-posted to various different units as his chain of command was concerned with him being able to go to sea.
 - (2) Since then, he continued to move around in order to prepare him to go back to sea; and
- d. When the incident occurred, B.H.J. had not completed his OJT. The incident delayed the completion of his OJT by a year. This prevented him going on his next career course, which he is still waiting to go on.

Circumstances of the offender

[6] Master Seaman Cooper is 30 years old and enrolled in the Canadian Armed Forces (CAF) in August 2006 as a naval communicator. By all accounts, he appears to have served his country well and has no previous conduct or criminal record for the court to consider. He has a high school education. He was awarded the following medals for his service: SWASM+AF, GCS-SWA, SWASM, OSM-EXP, NATO-OAE, NATO-AFRICA, QDJM.

Joint submission

[7] In a joint submission, the prosecution and defence counsel recommended that I impose a sentence of 22 months' imprisonment in addition to imposing the accompanying military punishments of dismissal from Her Majesty's Service and a reduction in rank to that of ordinary seaman.

[8] The joint submission before the court is reviewed in the context of the current Supreme Court of Canada (SCC) guidance in *R. v. Anthony-Cook*, 2016 SCC 43. In that decision, the SCC clarified that a trial judge must impose the sentence proposed in a joint submission "unless the proposed sentence would bring the administration of justice into disrepute, or is otherwise not in the public interest".

Assessing the joint submission

[9] In short, while the case of *Anthony-Cook* encourages counsel to work together to resolve matters and make joint submissions, it still requires that the submission comply with the sentencing principles set out within the *Criminal Code*. Hence, given the seriousness of the charges before this Court, it is my duty to examine the evidence in light of the applicable principles and objectives of sentencing, including those set out in sections 718, 718.1, 718.2 of the *Criminal Code*, as far as they are compatible with the sentencing regime provided under the *NDA*.

Objectives and principles of sentencing

[10] The fundamental purpose of sentencing in a court martial is to ensure respect for the law and the maintenance of discipline and, from a more general perspective, the maintenance of a just, peaceful and safe society. Moderation is a core principle of sentencing in Canada and does not allow a military court to impose a sentence beyond that required in the circumstances of the case.

[11] The QR&O require a military judge imposing a sentence at a court martial to consider "any indirect consequence of the finding or of the sentence [. . .] and impose a sentence commensurate with the gravity of the offence and the previous character of the offender." The sentence imposed must be adapted to the offender and the offence committed.

[12] Sentencing is an individualized process and in considering a joint submission, pursuant to the Court Martial Appeal Court (CMAC) direction in the case of *R. v. Tupper*, 2009 CMAC 5, I must assess the proposed sentence against the application of *Criminal Code* section 718 sentencing principles to ensure that a sentencing range is generally respected. This engages the parity principle and involves looking at similar cases, where I may see what types of sentences were imposed on similarly situated offenders in similar circumstances.

[13] Section 718 of the *Criminal Code* provides that the fundamental purpose of sentencing is to contribute to “respect for the law and the maintenance of a just, peaceful and safe society” by imposing just sanctions that have one or more of the following objectives:

- (a) to protect the public, which includes the Canadian Armed Forces;
- (b) to denounce unlawful conduct;
- (c) to deter the offender and other persons from committing offences;
- (d) to separate offenders from society, where necessary; and
- (e) to rehabilitate and reform offenders.

[14] When imposing sentence, a military court must consider the following principles:

- (a) the sentence must be proportionate to the gravity of the offence;
- (b) the sentence must be proportionate to the responsibility and previous character of the offender;
- (c) the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate; and
- (e) lastly, any sentence to be imposed by the court should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

Gravity of the offence

[15] The Alberta Court of Appeal in *R. v. Arcand*, 2010 ABCA 363 defined a major sexual assault at paragraph 171 as follows:

A sexual assault is a major sexual assault where the sexual assault is of a nature or character such that a reasonable person could foresee that it is likely to cause serious psychological or emotional harm, whether or not physical injury occurs. The harm might come from the force threatened or used or from the sexual aspect of the situation or from any combination of the two. A major sexual assault includes but is not limited to non-consensual vaginal intercourse, anal intercourse, fellatio and cunnilingus. [Footnotes omitted.]

[16] Sexual assault is a very serious offence and based on the definition in *Arcand*, the incident before this court martial is considered a major sexual assault. You went into

the bunk of a sleeping subordinate and performed fellatio on him without his consent. He had one small bunk to himself and you invaded it. He was tired and just wanted to sleep. You not only traumatized him, but you stalled his career and service within the Navy, his dream and imposed mental issues on him.

Parity of sentence

[17] In terms of the parity of sentencing, the law requires that I review the case law. The case law, as presented by the prosecution, sets out a range anywhere from 14 months to 3.5 years of imprisonment.

Sentence of imprisonment

[18] Counsel relied upon the following case law:

- (a) *R. v. Royes*, 2013 CM 4034 upheld at *R. v. Royes*, 2014 CMAC 10. Serious case where the member had sexual intercourse with an unconscious female private (subordinate) in his room on the base. She was intoxicated and could only mumble incoherent answers when she was asked her room number. He brought her to his room and took advantage of her while she was defenceless. The offender was sentenced to a period of 36 months' imprisonment;
- (b) *R. v. Sanderson*, 2016 ONCA 866. Offender and victim met at a social gathering at a mutual friend's home. The victim fell asleep on the couch. The accused had sexual intercourse with the victim without her consent, knowing she was not consenting. The offender was sentenced to a period of 30 months' imprisonment;
- (c) *R. v. Brewer*, 2014 NSSC 109. Male victim was 15 years of age and the offender was 39 years of age. They worked together. The victim stayed overnight in the offender's camper trailer and both consumed beer. The victim woke up to discover the offender naked and performing fellatio on him. The victim pushed him away and told him to stop. The offender complied and left the camper. The offender was sentenced to a period of 15 months' imprisonment;
- (d) *R. v. Bushell*, 2010 ABCA 205. Victim was a 16-year-old male living with his uncle. The offender was 29 years old and a friend of his uncle whom he first met that evening. The victim went to sleep and awoke later to find that his pants had been pulled down and the respondent was performing fellatio on him. He asked the respondent what he was doing, pushed him away and tried to pull his pants up. The offender left the victim's room. The offender

was sentenced to a period of 24 months' imprisonment which was upheld by the Alberta Court of Appeal; and

- (e) *R. v. Colbourne*, 2013 ONCA 308. After an evening of drinking, a group returned to a house party. The victim was sick in the car and vomited when she arrived home. She had to be helped out of her boots and upstairs to a bed. The victim's friend noticed the offender absent and went upstairs to check on victim and found the offender having sexual intercourse with the victim. The victim was still fully clothed from the waist up and still had her coat with her purse across her torso. Her pants were partially off. The offender was sentenced to a period of 14 months' imprisonment followed by 2 years' probation and was upheld on appeal.

Dismissal

[19] Dismissal is one of the most serious punishments available within section 139 of the *NDA*. In fact, it is the second most serious military punishment possible. It is a punishment that signifies that you have failed the standard expected of service members and, as such, you are no longer worthy to wear the uniform and serve within the CAF. It sends one of the strongest messages of deterrence and denunciation possible to the military community.

[20] Not only does such a sentence send a clear message of denunciation that this type of conduct is incompatible with military service, but it also reflects a complete disdain for it.

Reduction in rank

[21] In addition to the military punishment of dismissal, counsel have recommended that the court impose a reduction in rank, which although on its face might not seem like much to civilians as it is a punishment of a strictly military nature, its imposition is reserved for the most serious offences. It carries significant career implications earmarked by financial loss as well as the loss of professional standing and delivers a social stigma. It signifies that Master Seaman Cooper has betrayed the trust that is expected from members with his military rank and status and he is not deserving of wearing that rank.

Summary

[22] The coupling of the most severe military sanctions with a substantial period of imprisonment sends a strong message of denunciation and deterrence to both the public and the CAF of the consequences of such a significant breach of trust.

Objectives of sentencing to be emphasized in this case

[23] The prosecution has emphasized that, in their negotiations, they and defence counsel closely considered the objectives of sentencing. On the facts of this case, both the prosecution and defence stated that the objectives they considered most important are those of deterrence and denunciation as well as rehabilitation which, on the facts before the court, I agree with.

Mitigating and aggravating factors

[24] In the military justice system, as well as under paragraph 718.2(a) of the *Criminal Code*, the principles of sentencing require that a sentence be increased or reduced to account for any aggravating or mitigating circumstances relating to the offence or the offender. In making the joint submission, counsel advised the court that they weighed all relevant aggravating and mitigating factors.

Aggravating factors

[25] After hearing the submissions of both counsel, the Court highlights the following aggravating factors for the record:

- (a) Master Seaman Cooper's abuse of trust - As B.H.J.'s superior, Master Seaman Cooper breached every rule and standard of conduct expected of a superior. B.H.J. trusted you and thought you were looking out for him. But you were not, you betrayed him. You are individually responsible for this assault and you are morally culpable;
- (b) Place of the assault – The assault took place in his bunk, his few feet that he could call his own on a ship that had been deployed for many months;
- (c) Impact on victim - As indicated in the Agreed Statement of Facts, this offence impacted B.H.J. in the immediate aftermath and to this day in his loss of trust and it has compromised his progression within the Navy; and
- (d) Impact on unit - The commanding officer of Her Majesty's Canadian Ship *Athabaskan* indicated that the incident led to the repatriation of two members, forcing a requirement to fly in replacements. From a moral perspective, crew members were in disbelief that such an incident could happen onboard their ship and some feared for their own safety.

Mitigating factors

[26] After hearing the submissions of both counsel, the Court highlights the following mitigating factors for the record:

- (a) Admissions - As both counsel submitted, your admissions saved the court considerable time;
- (b) Previous good conduct - You have no prior convictions or bad conduct for the court to consider at this time. You have received some positive feedback in the various positions that you have held since the incident. As a result, you show promise for rehabilitation and it is the court's hope that you have learned from this. You are capable of building a future and a career as you clearly have the skills and the intellect to excel within the workplace; and
- (c) No violence - As the prosecution highlighted, you immediately left when asked to do so and there was no violence involved in the assault.

Summary

[27] After considering counsel's submissions in their entirety and considering all the evidence before the court, I must ask myself whether the acceptance of the proposed sentence would cause the CAF community and its members to lose confidence in the military justice system.

[28] Although I might have been inclined to award a more serious sentence, *Anthony-Cook* says that I may not reject a joint submission simply because I conclude that the sentence being proposed is outside what I would have given, outside the appropriate range, or unfit, or even demonstrably unfit. At paragraph 34 of *Anthony-Cook*, Justice Moldaver said that, in order to reject a joint submission, a sentencing judge must conclude that the sentence being proposed is:

so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down. [emphasis added]

[29] In short, the joint submission before the court falls within an acceptable range of precedents provided to the court, particularly in light of the balancing of all the aggravating and mitigating factors.

[30] The combined effect of imprisonment with dismissal from Her Majesty's service and reduction in rank sends a strong message of deterrence and denunciation to both military and civilian communities that such conduct is abhorrent.

[31] In short, the proposed sentence does not bring the administration of justice into disrepute and is consistent with the public interest.

Final comments

[32] The sexual assault you committed on a young service member is not only repulsive, but it is perhaps the most violable act that a superior could ever commit on a subordinate. When you committed it, you tarnished all of us. The simple news of this offence occurring has sent shivers from coast to coast. When service members serve away from home in confined quarters they are always vulnerable and there is an implied expectation of trust. It is sacrosanct. It is the Court's hope that the sentence imposed on you today will be a significant deterrent to anyone who might be tempted to do anything similar.

DNA

[33] In accordance with section 196.14 of the *NDA*, considering that the offence for which I have passed sentence is a primary designated offence within the meaning of section 196.11 of the *NDA*, I order, as indicated on the attached prescribed form, that the number of samples of bodily substances that is reasonably required be taken from Master Seaman Cooper for the purpose of forensic DNA analysis.

Sex offender registry

[34] In accordance with section 227.01 of the *NDA*, and considering that the offences for which I have passed sentence are designated offences within the meaning of section 227 of the *NDA*, I order you, as per the attached regulation form, to comply with the *Sex Offender Information Registration Act* for 20 years.

Weapons prohibition order

[35] Based on the position taken by the prosecution, I have also considered whether this is an appropriate case for a weapons prohibition order, as stipulated under section 147.1 of the *NDA*. In my opinion, such an order is neither desirable nor necessary for the safety of the offender or of any other person in the circumstances of this trial, particularly in light of the criteria applicable under section 109 of the *Criminal Code* in the context of an offence of sexual abuse. Even though the offence of sexual assault carries a ten-year maximum sentence of imprisonment and the charge itself constitutes a violent offence, and in the case before the court, violence with a weapon against a person was not used, threatened or attempted and I will not make an order to that effect.

FOR THESE REASONS, THE COURT:

[36] **SENTENCES** you to 22 months' imprisonment, dismissal from Her Majesty's service and reduction in rank to that of ordinary seaman.

[37] **ORDERS**, pursuant to *NDA*, section 196.14, that the number of samples of bodily substances that is reasonably required be taken from Master Seaman Cooper for the purpose of forensic DNA analysis.

[38] **ORDERS**, pursuant to *NDA*, section 227.01, Master Seaman Cooper to comply with the *Sex Offender Information Registration Act* for 20 years.

Counsel:

The Director of Military Prosecutions as represented by Major D.G.J. Martin and Captain E.E. Maidment

Major J.L.P.-L. Boutin, Defence Counsel Services, Counsel for Master Seaman D.T. Cooper